

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Virginia

CITIBANK, N.A.)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:10cv411
)	
AN CONSTRUCTION CO,)	
INC., <u>et al</u>)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

This matter came before the Court pursuant to an Order by the Honorable T.S. Ellis and on plaintiff's Motion for Default Judgment. (Dkt. Nos. 12, 13.) After a representative for defendants An Construction, Mr. Chan An, and Ms. Suzan P. An failed to appear at the August 27, 2010 hearing, the Court took plaintiff's Motion under advisement to issue this Report and Recommendation.

I. INTRODUCTION

Plaintiff Citibank ("plaintiff"), with principal place of business in New York, filed suit against defendants An Construction, Mr. An, and Ms. An, citizens of Virginia, alleging default on a promissory note ("2005 Note"). Here plaintiff requests entry of default judgment against An Construction and Mr. An ("defendants").

A. Jurisdiction and Venue

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a) because the parties have diverse citizenship and the amount in controversy exceeds the jurisdictional requirement. Venue in this District is based on 28 U.S.C. § 1391 (a) because (i) all the defendants reside in Virginia and at least one defendant resides in this district; and (ii) a substantial part of the events and omissions giving rise to the claim occurred in this district in that defendant's place of business is in this District.

B. Process and Service

Plaintiff filed its initial Complaint on April 23, 2010. Summons was served on An Construction care of Virginia State Corporation Commission, to Kim Book, on May 11, 2010 at 1300 East Main Street, Richmond, Virginia 23219 (Dkt. No. 5; Mot. for Default J. ¶ 4.) On May 13, 2010, summons was served on Mr. An by posting on the front door and mailing to 410 Berry Street, SE, Vienna, Virginia 22180. (Dkt. 6). Pursuant to Federal Rule of Civil Procedure 12, defendants had twenty-one (21) days after receiving service of process to serve an Answer. FED. R. CIV. P. 12. Accordingly, defendants' Answers to the Complaint were due on June 1, 2010 and June 3, 2010 respectively. (Dkt. 5,6). Plaintiff to this date has not been able to serve Ms. An, and

does not seek default judgement against her here.¹

C. Grounds for Entry of Default

On July 26, 2010, the Honorable T.S. Ellis set this matter for default proceedings before the undersigned Magistrate Judge. (Dkt. 12). On July 23, 2010, plaintiff requested an entry of default against defendants An Construction and Mr. Chan W. An. (Dkt. 10). The Clerk entered default on July 26, 2010. (Dkt. No. 11). On August 13, 2010, plaintiff filed a Motion for Default Judgment and Affidavit in support thereof. (Dkt. 13). To date, defendants have failed to file an Answer or other responsive pleading. (Mot. for Default J. at 4). When no representative for defendants attended the August 27, 2010 hearing on plaintiff's Motion for Default Judgment, the Court took the Motion under advisement to issue this Report and Recommendation.

II. FINDINGS OF FACT

Upon a full review of the pleadings, the undersigned

¹ Plaintiff's Motion for Default Judgment does not seek judgment against Ms. An, for whom summons has not been executed. (Dkt. 13). Plaintiff filed a Motion for Extension of Time to Serve the Summons and Complaint on Suzan P. An, which was granted on August 23, 2010 (Dkt. 18). According to plaintiff's counsel, as of October 12, 2010 plaintiff's efforts to serve Ms. An have not been successful, and plaintiff does not seek default judgment against her.

Magistrate Judge finds that plaintiff has established the following facts.²

Plaintiff is a national banking association with its principal place of business in New York. (Mot. for Default J. at 2). Defendant An Construction is defunct Virginia corporation, and defendant Mr. An is a citizen of Virginia. (Mot. for Default J. at 2). Ms. An has not been served, and plaintiff does not seek judgment against her. (Dkt. 13).

On December 17, 2003, An Construction executed and delivered a series of loan documents to plaintiff. These included 2003 Note, the Continuing Guaranty, the Security Agreement on An Construction assets, and the Hypothecation Agreement creating a lien on a Smith Barney account. (Comp. ¶8-11). On December 31, 2004, defendants executed a modification Note and an accompanying Continuing Guaranty. (Comp. ¶12,13).

On March 18, 2005, An Construction executed a Relationship Ready Credit Agreement ("2005 Note"), which extended a \$300,000 line of credit to An Construction for any legal business or professional purpose. (Comp. ¶14,15). The 2005 Note provided that An Construction would pay the entire balance of principal, interest, fees, and charges to plaintiff in each 12-month period beginning on the date of execution March 18, 2005. (Comp. ¶17).

² The pleadings include the Complaint (Dkt. No. 1), and plaintiff's Motion for Default Judgment, including the Affidavit of Deborah A. Lesueur ("Lesueur Aff.") and J. David Folds ("Folds Aff.") (Dkt. No. 13).

Moreover, the 2005 Note required An Construction to pay costs and expenses of collection, including attorney's fees and court costs. (Comp. ¶20). Pursuant to the guaranty agreements, Mr. An guaranteed to pay existing and future obligations to plaintiff. (Comp. ¶39).

An Construction and Mr. An defaulted under the 2005 Note by failing to pay the amount due and owing from March 18, 2007 to March 17, 2008. (Comp. ¶22). On August 26, 2008, Citibank notified An Construction that it had defaulted on the 2005 Note. (Comp. ¶23). Notwithstanding the fact that from August 26, 2008 until November 3, 2008, An Construction made some payments to Citibank, and that the parties made efforts to restructure the defendants' debts, defendants failed to pay the total amount due under the loan documents. (Comp. ¶24-29). On December 11, 2009, Citibank exercised its rights to seize possession of the Smith Barney account under the Hypothecation Agreement. (Comp. ¶27,29). On August 9, 2010, plaintiff filed its motion seeking payment for defendants default on the 2005 Note.

At the time this lawsuit was initiated, defendant owed \$134,093.91 (representing the principal of \$74,647.57, together with accrued interest of \$14,679.47, late fees of \$428.66, and expenses of \$44,338.21). Also interest continues to accrue at the per diem rate of \$7.16. (Mot. for Default J. at 4 ; Lesueur Aff. ¶5). Pursuant to the loan agreement, An Construction and

Mr. An are jointly and severally liable to plaintiff for the full amount owing. (Mot. for Default J. at 4).

IV. RECOMMENDATION

The undersigned Magistrate Judge recommends entry of judgment against defendants An Construction and Mr. Chan An, jointly and severally, in the amount of \$134,093.91, together with interest accruing from and after August 9, 2010 at the per diem rate of \$7.16, along with post judgment interest on the total sum awarded from the date judgment is entered.

V. NOTICE

The parties are advised that exceptions to this Report and Recommendation, pursuant to 28 U.S.C. § 636 and Rule 72(b) of the Federal Rules of Civil Procedure, must be filed within ten (14) days of its service. A failure to object to this Report and Recommendation waives appellate review of any judgment based on it.

The Clerk is directed to send a copy of this Report and Recommendation to all counsel of record, and to defendants at the following addresses:

An Construction Co., Inc.
c/o Virginia State Corporation Commission
1300 East Main Street
Richmond, Virginia 23219

Mr. Chan W. An
410 Berry St., SE
Vienna, Va 22180

/s/

THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

October 13 ,2010
Alexandria, Virginia